

Board of Alien Labor Certification Appeals
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: April 3, 1997

CASE NO: 95-INA-509

In the Matter of:

**PAUL HOJNOWSKI,
Employer,**

On Behalf of:

**KRYSTYNA KUCAMARSKA,
Alien**

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Krystyna Kuczmarska (Alien) filed by Paul Hojnowski (Employer) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at New York, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Statutory authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.²

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

Statement of the case. On September 23, 1993, the Employer filed an application for labor certification to enable the Alien, who is a Polish national, to fill the employment opportunity position of Family Dinner Service Specialist, Live-out, in the Employer's household in Glen Head, New York. The duties of the position offered were described in Form ETA 750 as follows:

Plans menus and cooks meals according to recipes, Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. Serves meals, Performs seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. Prepares meals with low sugar contents. The minimum educational requirements are high school graduation. The required experience is two years of experience in the job offered. The Alien's immediate supervisor in this job will be the Residence Owner. The Alien will have no supervisory duties. The rate of pay offered for a forty hour week on this position was \$12.48 per hour. AF 08. The CO classified the job under Occupation Code 305-281.010, Cook (Household) Live-out.

Alien's qualifications. The Alien's educational qualifications met the application criteria. In addition, the Alien was a cook in the catering business. From January to December 1990. the Alien was a "Cook Domestic Live-Out" from December 1990 to April 1993, after which she was self employed as a cook for special occasions and parties until the date of application. AF 05-06.

Recruitment report. Employer's April 11, 1994, report on his recruitment effort and indicated that of three U.S. workers who responded to the newspaper advertisement, one was qualified. AF 24-36.

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

Notice of finding. On February 22, 1995, the CO's NOF advised the Employer that certification would be denied on the record as it stood, subject to rebuttal on or before March 29, 1995.

The CO found first that the position of Cook (Household) Live-out did not constitute full-time employment in the context of Employer's household, as described by the application. The CO also found that the Employer had failed to interview applicants Dora Powell and Mary Dean and that the recruitment report did not accurately describe Employer's consideration of the applications of these U. S. workers for the position offered, as provided in 20 CFR §§ 656.24(b)(2)(ii), 656.(b)(6), and 656.20(c)(8). By way of rebuttal, the Employer was directed to explain and document his appraisal of the U.S. workers as unqualified and explain his failure to interview them. AF 41-44.

Rebuttal. By the March 27, 1995, letter and attachments of the Employer's representative, the Employer discussed the issues raised in the NOF, filed a copy of Form ETA 750, and enclosed documentation to comply with the CO's directions. AF 46-92.

In response to the first issue, the Employer provided a detailed work schedule to demonstrate that the cook's job was full time. He then documented his arrangements to have his house cleaned to demonstrate that this would not be part of the cook's duties. AF 69-73; 78-91. In addition, the Employer offered documents showing the events that occurred in the course of his dealings with the U.S. workers AF 72-77.

Final Determination. By the Final Determination (FD) the CO denied certification On April 3, 1995.

First, the CO found that the job did not constitute full time employment. While noting that the job description in the application stood alone in the appraisal of the job duties as full time employment, the CO did consider the representative schedule. The CO found this schedule "unrealistic," observing that the functions indicated did not require the great amounts of time Employer assigned for their accomplishment.

Noting that none of the documentation demonstrated the Employer's need for a full time eight hour a day cook for this one-person household, the CO concluded that the Employer had failed to demonstrate that a bona fide full time position was offered. AF 93-95.

Request for Review. The Employer again submitted the written argument it had filed in response to the NOF. The cases cited have been examined, and Employer's argument has been reexamined in the context of this appeal.

Discussion. The item to which the CO gave the greatest consideration was the schedule showing the work that the proposed job would require from day to day. The CO's appraisal that excessive amounts of time were allotted to functions that normally would require much shorter time periods to accomplish is a persuasive reason to agree with the CO's conclusion that this schedule is not consistent with the duties the worker would reasonably be expected to perform. Moreover, as the NOF pointed out, without more, the job description in this application does not describe duties that are sufficient to require the time that the work schedule allotted to the respective functions. AF 98-99; **Delitzer Corp. of Newton**, 88-INA-482(May 9, 1990)(en banc).

For this reason it is concluded that the employer failed to carry its burden of proof and we agree with the conclusion of the CO. Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: Paul Hojnowski, Employer
Krystyna Kuczmarska, Alien

Case No : 95-INA-509

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT
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Holmes	:	:	:	:
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Huddleston	:	:	:	:
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Thank you,

Judge Neusner

Date: March 11, 1997